

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**American Alpha Construction, Inc. and United Order of American Bricklayers and Stone Masons Local No. 21 Illinois, affiliated with the International Union of Bricklayers and Allied Craftworkers, AFL-CIO.** Case 13-CA-40937-1

April 28, 2004

**SUPPLEMENTAL DECISION AND ORDER**

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND WALSH

On September 26, 2003, the National Labor Relations Board issued a Decision and Order<sup>1</sup> granting the General Counsel's motion for default judgment and finding, inter alia, that the Respondent had violated Section 8(a)(3) and (1) of the Act by refusing to consider for hire or hire applicants Jose Alvarado, Mike Erdenberger, Steve Nelms, and Don Newton about March 4 and 10, 2003. However, consistent with *Jet Electric Co.*, 334 NLRB 1059 (2001), supplemental decision 338 NLRB No. 77 (2002), the Board held in abeyance a final determination of the appropriate remedy pending a hearing or amended complaint and renewed motion for default judgment addressing the limited issue of the number of openings that were available to the discriminatee applicants under *FES*, 331 NLRB 9 (2000), supplemental decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002).

Subsequently, on January 13, 2004, the Acting Regional Director for Region 13 issued a first amended complaint alleging that since about March 4, 2003, and thereafter, the Respondent had at least four bricklayer positions available that it was seeking to fill. The amended complaint further alleged that the four discriminatee applicants were qualified for the bricklayer positions. The Respondent failed to file an answer to the amended complaint.

Accordingly, on March 15, 2004, the General Counsel filed a renewed Motion for Default Judgment with the Board. On March 18, 2004, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Default Judgment**

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the amended complaint affirmatively stated that unless an answer was filed within 14 days from service of the amended complaint, all the allegations therein would be considered true. Further, the undisputed allegations in the renewed motion disclose that the Region, by letter dated February 18, 2004, notified the Respondent that unless an answer was received by February 24, 2004,<sup>2</sup> a renewed motion for default judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer,<sup>3</sup> we grant the General Counsel's renewed Motion for Default Judgment with respect to the allegations in the amended complaint.

On the entire record, the Board makes the following

**FINDINGS OF FACT**

Consistent with the allegations in the amended complaint, which have effectively been admitted by the Respondent's failure to file an answer, we find that, on or about March 4, 2003, and thereafter, the Respondent had at least four bricklayer positions available for discriminatee applicants Jose Alvarado, Mike Erdenberger, Steve Nelms, and Don Newton.

**REMEDY**

Having found that the Respondent had at least four job openings available for applicants Jose Alvarado, Mike Erdenberger, Steve Nelms, and Don Newton at the time the Respondent refused to consider for hire or hire them, we find that an instatement and make-whole remedy is appropriate. Accordingly, we reaffirm the Order in the Board's earlier decision as modified to require the Respondent to offer Jose Alvarado, Mike Erdenberger, Steve Nelms, and Don Newton instatement to positions for which they applied, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination

<sup>2</sup> The letter inadvertently stated this date as February 24, 1004.

<sup>3</sup> Copies of the amended complaint were sent by certified mail to the Respondent and its registered agent. The envelope containing the amended complaint sent to the Respondent was returned by the Postal Service to the Regional Office marked "Refused & Return." The Respondent's failure or refusal to claim certified mail or to provide for receiving appropriate service cannot serve to defeat the purposes of the Act. See *I.C.E. Electric, Inc.*, 339 NLRB No. 36, slip op. at 1 fn. 2 (2003), and cases cited there. In any event, the envelope containing the amended complaint sent to the Respondent's registered agent was delivered on February 19, 2004.

<sup>1</sup> 340 NLRB No. 48 (2003).

against them. We shall further order the Respondent to make Alvarado, Erdenberger, Nelms, and Newton whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful discrimination against them. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

#### ORDER

The National Labor Relations Board orders that the Respondent, American Alpha Construction, Inc., West Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees and/or job applicants about their union membership.

(b) Excluding employee-applicants from its hiring process by refusing to provide them with applications for future employment with the Respondent because they support and assist a union and engage in concerted activities, or to discourage employees and other individuals from engaging in such activities.

(c) Refusing to consider for hire or hire employee-applicants because they support and assist a union and engage in concerted activities, or to discourage employees and other individuals from engaging in such activities.

(d) Failing and refusing to reinstate to their former jobs unfair labor practice strikers who have made unconditional offers to return to work.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer full reinstatement to James Allen, Robert Fital, Marcin Kazberuk, Huptych Krzystof, and Michael Lowery to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

(b) Make James Allen, Robert Fital, Marcin Kazberuk, Huptych Krzystof, and Michael Lowery whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, offer Jose Alvarado, Mike Erdenberger, Steve Nelms, and Don Newton reinstatement to positions for which they would have applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their

seniority or any other rights or privileges they would have enjoyed absent the discrimination against them.

(d) Make Jose Alvarado, Mike Erdenberger, Steve Nelms, and Don Newton whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful discrimination against them, with interest, as set forth in the remedy section of this decision.

(e) Within 14 days from the date of this Order, remove from its files all references to the unlawful refusal to reinstate Allen, Fital, Kazberuk, Krzystof, and Lowery, and the unlawful refusal to consider for hire or hire Alvarado, Erdenberger, Nelms, and Newton, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful conduct will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in West Chicago, Illinois, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 4, 2003.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

---

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. April 28, 2004

Robert J. Battista,	Chairman
<hr/>	
Wilma B. Liebman,	Member
<hr/>	
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate employees and/or job applicants about their union membership.

WE WILL NOT exclude employee-applicants from our hiring process by refusing to provide them with applications for future employment with us because they support and assist a union and engage in concerted activities, or to discourage employees and other individuals from engaging in such activities.

WE WILL NOT refuse to consider for hire or hire employee-applicants because they support and assist a union and engage in concerted activities, or to discourage employees and other individuals from engaging in such activities.

WE WILL NOT fail and refuse to reinstate to their former jobs unfair labor practice strikers who have made unconditional offers to return to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer full reinstatement to James Allen, Robert Fital, Marcin Kazberuk, Huptych Krzystof, and Michael Lowery to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make James Allen, Robert Fital, Marcin Kazberuk, Huptych Krzystof, and Michael Lowery whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL, within 14 days from the date of the Board's Order, offer Jose Alvarado, Mike Erdenberger, Steve Nelms, and Don Newton reinstatement to positions for which they would have applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them.

WE WILL make Jose Alvarado, Mike Erdenberger, Steve Nelms, and Don Newton whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the unlawful refusal to reinstate Allen, Fital, Kazberuk, Krzystof, and Lowery, and the unlawful refusal to consider for hire or hire Jose Alvarado, Mike Erdenberger, Steve Nelms, and Don Newton, and WE WILL, within 3 days thereafter, notify them in writing that this has been done, and that the unlawful conduct will not be used against them in any way.

AMERICAN ALPHA CONSTRUCTION, INC.